IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1342 OF 2007

M/s.Esteam Services (Proprietory Farm) having its office at 160, A/2 Shah & Nahar Ind. Estate, S.J. Marg, Lower Parel (West), Mumbai 400 013, India through its Proprietress Mrs.Shobha Samir Mehta, residing at 2nd floor, 95, Shantinekatan CHS Ltd. Marine Drive, Mumbai - 400 002. ..Petitioner.

V/s.

1) Union of India (through the Joint Secretary, Govt. of India Ministry of Finance, Department of Revenue, North Block, New Delhi

2) The Assistant Registrar, The Customs, Excise and Service Tax Appellate Tribunal (W.Z.B.) 3rd, 4th & 5th floor, Jai Centre 34,P.D'Mello Road, Poona Street, Masjid Bunder(East) Mumbai-400 009.

3) Commissioner (Appeals) Central Excise, Pune-II, F-Wing, 4th Floor, Ice House, 41/A, Sasoon Road, Opp. Wadia College, Pune - 411 001.

4) Deputy Commissioner of Central Excise & Customs, Ichalkaranji Division at Miraj, Central Excise Building, Sangli Miraj Road, Miraj - 416 410. ..Respondents.

Mr.Basil Menezes for petitioner.

Mr.R.Ashokan with M.I.Sethna, senior counsel for respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 13TH SEPTEMBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard. Rule. Rule made returnable forthwith. By consent of parties, the petition is taken up for final hearing.

2. This petition is filed to challenge the order of CESTAT dated 22/9/2006 whereby the Tribunal has allowed the appeal filed by Revenue against the order of Commissioner of Central Excise (A) dated 22/2/2005.

3. In this case, the petitioner had filed a refund claim on 30/3/2004 claiming refund of Rs.5,45,942/-. By a show cause notice dated 16/6/2004 the Dy. Commissioner of Central Excise, Ichalkaranji called upon the petitioner to show cause as to why the refund claim of Rs.5,27,396/- out of Rs.5,45,942/- should not be rejected as time barred. By a corrigendum dated 3rd September, 2004 an additional ground was added to the show cause notice dated 16/6/2004 and the petitioner was called upon to show cause as to why the refund claim should not be rejected under Rule 5 of the Cenvat Rules, 2000 in view of the fact that the petitioner had availed drawback under the Customs and Central Excise Drawback Rules, 1995 / Rebate claim under Central Excise Rules, 2002.

4. By an order dated 29th October, 2004 the adjudicating authority sanctioned refund of Rs.18,546/- and rejected the claim in the sum of Rs.5,27,396/-.

5. Being aggrieved by the aforesaid order the petitioner filed an appeal and the Commissioner of Central Excise (A) by his order dated 22/2/2005 held that in view of the reversal of the drawback / rebate the petitioner is entitled to refund of Rs.3,61,786/-.

6. Challenging the said order the revenue filed an appeal before the CESTAT and by the impugned order dated 22/9/2006 the Tribunal allowed the appeal filed by the revenue. Challenging the said order of the Tribunal, the present petition is filed.

7. The basic issue before the Tribunal was whether the Commissioner of Central Excise(A) by his order dated 22/2/2005 was justified in granting refund of Rs.3,61,786/-. On perusal of the impugned order, it is seen that the Tribunal by the said order has disposed of two appeals filed by the revenue namely appeal against the order of Commissioner of Central Excise (A) dated 22/2/2005 and another order of Commissioner of Central Excise (A) dated 28/2/2005. Copy of the order of Commissioner of Central Excise (A)

dated 28/2/2005 is neither annexed to the Writ Petition nor to the reply filed on behalf of the respondents.

8. Mr.Menezes learned counsel for the petitioner submitted that once the Joint Commissioner of Central Excise by his order dated 31/12/2004 has dropped the show cause notice dated 17/6/2004, the revenue could not have rejected the refund claim of the petitioner by adjudicating the show cause notice dated 16/4/2004. Mr.Menezes further submitted that the impugned order of the Tribunal was in violation of the principles of natural justice because the Tribunal has denied the refund allowed by the Commissioner of Central Excise (A) on the ground that the petitioner has availed cash drawback from the customs department and also availed rebate of duty, when in fact there was no such allegation in the show cause notice.

9. We do not find any merit in the above contention, because, by the corrigendum dated 3/9/2004 to the show cause notice dated 16/6/2004 the petitioner was specifically called upon to show cause as to why the refund claim should not be rejected under Rule 5 of the Cenvat Credit Rules, 2002 if the drawback under the Customs& Central Excise Duties Drawback Rule, 1995 or rebate of duty under the Central Excise Rules, 2002 are availed. Therefore, it is not open to the petitioner

to contend that the refund claim could not be rejected on the ground of availment of duty drawback / rebate.

10. However, in view of the grievance of the petitioner that the impugned order is violative of the principles of natural justice and in view of the fact that by the impugned order, the Tribunal has disposed of two different appeals filed by the revenue without going into the merits of the case, we set aside the impugned order and direct the Tribunal to decide both the appeals afresh and after giving an opportunity of hearing to both the parties. The Tribunal is also directed to consider the propriety of the adjudication order passed by the Joint Commissioner, Pune on 31/12/2004 wherein the effect of the adjudication order passed by the Deputy Commissioner of Central Excise on 29/10/2004 has not been considered.

11. Accordingly, the petition is allowed by setting aside the impugned order dated 22/9/2006. The matter is remanded back to the CESTAT for decision on merits and in accordance with law. All contentions of both parties are kept open.

12. Petition is disposed of accordingly, however, there shall be no order as to costs.

(F.I.REBELL0, J.)

(J.P.DEVADHAR, J.)